

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 6 August 2024

DOCKET NUMBER: AR20240005292

APPLICANT REQUESTS: correction of his record to show he was medically retired instead of discharged at the expiration of term of service (ETS).

APPLICANT'S SUPPORTING DOCUMENT(S) CONSIDERED BY THE BOARD:

- DD Form 149 (Application for Correction of Military Record)
- five DD Forms 214 (Certificate of Release or Discharge from Active Duty)
- National Guard Bureau (NGB) Form 22 (National Guard Report of Separation and Record of Service)
- Honorable Discharge Certificate
- Department of Veterans Affairs (VA) Rating Decisions
- VA Mental Disorders Disability Benefits Questionnaire (DBQ)
- VA General Medical Separation Assessment DBQ
- VA Back (Thoracolumbar) DBQ
- VA Headaches (including migraine headaches) DBQ
- VA Hip and Thigh DBQ
- VA Neck (Cervical Spine) DBQ
- VA Skin DBQ
- VA Hearing Loss and Tinnitus DBQ
- VA Audiological Evaluation
- VA Compensation and Pension Examination Note

FACTS:

1. The applicant did not file within the 3-year time frame provided in Title 10, U.S. Code, section 1552(b); however, the Army Board for Correction of Military Records (ABCMR) conducted a substantive review of this case and determined it is in the interest of justice to excuse the applicant's failure to timely file.

2. The applicant states:

a. He served in the Army National Guard (ARNG) from 2010 to 2018. He served on active duty as follows:

- 16 February to 1 July 2010, basic combat, and advance individual training
- 3 June 2013 to 31 December 2014, Active Duty for Operational Support (ADOS)
- 16 January 2015 to 16 January 2016, deployment (Guantanamo Bay, Cuba)
- 19 January to 16 August 2016, ADOS

b. When he returned from deployment in 2016, he had several medical issues that needed attention. The VA rated him 80% disabled in January 2016 and increased his disability rating to 100% in May 2016. Since he was serving on active duty for ADOS, he informed his chain of command of his VA disability rating and of the medical issues he was facing. He was told by his unit that his medical issues would make him non-deployable, and he would no longer be able to serve under ADOS. He did not know what to do so he called the State's Surgeon General's Office and spoke to a major who confirmed this information.

c. Because of all of this going on and the medical hardship he was facing, he requested to be evaluated for a medical retirement since he was rated disabled by the VA and could not perform his duties as a Soldier because of his disabilities. His ADOS orders were terminated on 16 August 2016, and he waited for his medical discharge papers. He moved out of State for a civilian job because he had lost his ADOS job. He held the civilian job for a couple months only and he lost that job also because of his disabilities. He has not worked since 2017 and he is still rated 100% permanent and totally disabled by the VA. He just received information that he was not medically discharged or retired and that he was just discharged at his ETS date of January 2018. He had informed his chain of command in 2016 of his VA disability rating and that he should be medically retired.

d. Because of the reasons listed above, and the fact that he requested a medical retirement board, and he was 100% disabled prior to his release from active duty, he is requesting his discharge be changed to a medical retirement. If he were still in the Army, he would be filing an Article 138, Uniform Code of Military Justice (Complaint of Wrongs Against the Commanding Officer), to address this issue and if that did not work, he would be filing a complaint to the inspector general. Since he was incorrectly discharged, none of those actions fit. The only path he has now is filing for a correction of records.

e. It would be in the best interest of the Board to correct this injustice because of his medical conditions at the time of active service and because he did everything within his abilities by informing his chain of command of his medical information and providing them documentation. He was at the time of active duty service severely disabled and unable to keep his ADOS job because of this. He informed his chain of command of his medical conditions and submitted all of his medical files to them. He requested a medical retirement, and this was not done. He did not know this happened right away due to him moving and being disabled. I did not know this happened until years later

when he contacted the ARNG about the status and discharge paperwork. Only then he found out his discharge was incorrect.

3. The applicant enlisted in the ARNG on 27 January 2010 for a period of eight years. His enlistment agreement shows he agreed to serve six years as a member of a troop program unit and two years as a member of the Individual Ready Reserve.

4. The applicant served through multiple extensions in a variety of assignments, and he was promoted to sergeant/E-5 in December 2014.

5. The applicant's final NCO Evaluation Report was an annual report covering the rating period 18 December 2014 through 17 December 2015. It shows he was a successful NCO, maintained Army height and weight standards, and had passed his Army physical fitness test (APFT) on 28 August 2015.

6. The applicant provided five DD Forms 214 showing his periods of active service. His last DD Form 214 on record shows he entered active duty on 19 January 2016. He held military occupational specialty 31B, Military Police. This DD Form 214 show she served in Cuba from March to December 2015.

7. On 4 August 2016, the applicant submitted a DA Form 4187 (Personnel Action) requesting transfer to the Inactive National Guard (ING) due to temporary out of state employment. A Developmental Counseling Form shows he was counseled on 4 August 2016 by his commander regarding his responsibilities while in the ING. The form also shows he requested transfer to the ING through the remainder of his enlistment contract, ETS date of 1 March 2017.

8. The applicant's DD Form 214 shows he was released from active duty on 16 August 2016 in accordance with chapter 4 of Army Regulation 635-200 (Active Duty Enlistment Administrative Separations) by reason of completion of required active service (Separation Code MBK and Reentry Code NA).

9. Orders issued on 17 October 2016 directed the applicant's transfer to the ING effective 17 October 2016.

10. The applicant's NGB Form 22 shows he was discharged from the ARNG on 1 March 2017, in accordance with Section 260 of California M/VC and paragraph 3-35a of National Guard Regulation (NGR) 600-200 (Enlisted Administrative Separations) by reason of ETS, with Reenlistment Code 1. He was transferred to the U.S. Army Reserve (USAR) Control Group (Annual Training).

11. The applicant was honorably discharged from the USAR effective 30 January 2018.

12. There is no evidence in the applicant's available records (e.g., physical profile) indicating he was unable to perform his military duties due to a medical disability.

13. The applicant provided his VA rating decisions showing he was granted service-connected disability compensation for various medical conditions with a disability rating of 100%.

14. The Army rates only conditions determined to be physically unfitting at the time of discharge, which disqualify the Soldier from further military service. The Army disability rating is to compensate the individual for the loss of a military career. The VA does not have authority or responsibility for determining physical fitness for military service. The VA may compensate the individual for loss of civilian employability.

15. MEDICAL REVIEW:

a. The Army Review Boards Agency (ARBA) Medical Advisor was asked to review this case. Documentation reviewed included the applicant's ABCMR application and accompanying documentation, the military electronic medical record (AHLTA), the VA electronic medical record (JLV), the electronic Physical Evaluation Board (ePEB), the Medical Electronic Data Care History and Readiness Tracking (MEDCHART) application, and/or the Interactive Personnel Electronic Records Management System (iPERMS). The ARBA Medical Advisor made the following findings and recommendations:

b. The applicant is applying to the ABCMR requesting, in essence, a referral to the Disability Evaluation System (DES). He has indicated on his DD 149 that Other Mental Health conditions is an issue related to this request. He states in part: "I was rated 80% VA Disabled in January 2016 and I was reevaluated and granted 100% VA Disabled May 2016. Come to find out now I just received information that I was not medically discharged or retired and I was just discharged under my original ETS date of January 2018. I informed my chain of command my VA Disability rating and be Medically Retired in 2016. I had to stop my ADOS Title 32 Active job because of my medical conditions. Because of the reasons listed above and the fact I requested a medical retirement board and was 100% VA Disabled prior to my discharge from active duty I am requesting my Army Discharge code change to a Medical Retirement code."

c. The Record of Proceedings details the applicant's military service and the circumstances of the case. His NGB Form 22 for the period of Service under consideration shows he enlisted in the ARNG on 27 January 2010 and received an honorable discharge from the CAARNG on 20 June 12 under the separation authority provided by paragraph 6-35a of NGR 635-200, Enlisted Personnel Management (31 July 2009): ETS (expiration – term of service). It shows a total service that period of 7

years, 1 months, and 5 days. His reenlistment eligibility code of 1 denotes he was fully qualified to reenlist.

d. A Personnel Action (DA Form 4187) shows that on 4 August 2016 the applicant requested transfer to the Inactive National Guard (ING) effective 1 September 2016 “Specifically for temporary out of state residency for employment.

e. The applicant asserts he had to stop working because of his disabilities. Orders published by the CAARNG 28 January 2016 show he was ordered to Full Time National Guard Duty – Operation Support (FTNGD-OS) from 28 January 2016 thru 31 March 2016; and a second set of orders published by the CAARNG on 30 March 2016 show he was ordered to annual training from 1 April 2016 thru 30 September 2016.

f. The applicant has no permanent physical profiles in MEDPROS and his most recent temporary profile was issued on 14 November 2013 for “Left Hip Pain” with an expiration date on 12 February 2014.

g. The applicant’s final NCO Evaluation Report was an annual covering 18 December 2014 thru 17 December 2015. It shows he was a successful NCO, maintained Army height and weight standards, and had passed his Army physical fitness test (APFT) on 28 August 2015 with his rater commenting “trained and motivated his squad to increase APFT scores by 36%.” The applicant was marked as meeting or exceeding all Army Values with the senior rater opining:

- “send to ALC [Advanced Leader Course] immediately; unlimited potential for assignments of greater responsibility
- promote ahead of peers
- exemplifies BE, KNOW, DO”

h. There is insufficient probative evidence the applicant had any service incurred medical condition which would have failed the medical retention standards of chapter 3 of AR 40-501, Standards of Medical Fitness, prior to his voluntary separation; or which prevented the applicant from reenlisting and continuing his military career. Thus, there was no cause for referral to the Disability Evaluation System. Furthermore, there is no evidence that any medical condition prevented the applicant from being able to reasonably perform the duties of his office, grade, rank, or rating prior to his voluntary separations.

i. Review of his records in JLV shows he has been awarded multiple VA service-connected disability ratings for a combined rating of 100%. These include Dysthymic Disorder, Migraine Headaches, and Lumbosacral or Cervical Strain. However, the DES compensates an individual only for service incurred medical condition(s) which have been determined to disqualify him or her from further military service. The DES has

neither the role nor the authority to compensate service members for anticipated future severity or potential complications of conditions which were incurred or permanently aggravated during their military service; or which did not cause or contribute to the termination of their military career. These roles and authorities are granted by Congress to the Department of Veterans Affairs and executed under a different set of laws.

j. Paragraph 3-1 of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (20 March 2012) states: "The mere presence of an impairment does not, of itself, justify a finding of unfitness because of physical disability. In each case, it is necessary to compare the nature and degree of physical disability present with the requirements of the duties the Soldier reasonably may be expected to perform because of their office, grade, rank, or rating."

k. It is the opinion of the ARBA medical advisor that a referral of his case to the DES is unwarranted.

BOARD DISCUSSION:

After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted. The applicant's contentions, the military record, and regulatory guidance were carefully considered. The evidence of record shows the applicant served in the ARNG from 27 January 2010 to 1 March 2017. He was separated from the ARNG in accordance with his State military code and NGR 600-200 (Enlisted Administrative Separations) by reason of ETS, with Reenlistment Code 1. He was transferred to the USAR Control Group (Annual Training), and he was ultimately honorably discharged from the USAR effective 30 January 2018. The Board did not see evidence in the applicant's available records (e.g., physical profile) indicating he was unable to perform his military duties due to a medical disability. The Board also reviewed and agreed with the medical reviewing official's finding insufficient probative evidence that any conditions were incurred during or permanently aggravated during this drilling Soldiers service. There is insufficient probative evidence the applicant had any service incurred medical condition which would have failed the medical retention standards of chapter 3 of AR 40-501, Standards of Medical Fitness, prior to his voluntary separation; or which prevented the applicant from reenlisting and continuing his military career. Thus, there was no cause for referral to the Disability Evaluation System. Furthermore, there is no evidence that any medical condition prevented the applicant from being able to reasonably perform the duties of his office, grade, rank, or rating prior to his voluntary separations.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

:	:	:	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
█	█	█	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

The evidence presented does not demonstrate the existence of a probable error or injustice. Therefore, the Board determined the overall merits of this case are insufficient as a basis for correction of the records of the individual concerned.

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I certify that herein is recorded the true and complete record of the proceedings of the Army Board for Correction of Military Records in this case.

REFERENCES:

1. Title 10, U.S. Code, section 1552(b), provides that applications for correction of military records must be filed within 3 years after discovery of the alleged error or injustice. This provision of law also allows the ABCMR to excuse an applicant's failure to timely file within the 3-year statute of limitations if the ABCMR determines it would be in the interest of justice to do so.
2. Army Regulation 40-501 (Standards of Medical Fitness) provides that for an individual to be found unfit by reason of physical disability, they must be unable to perform the duties of their office, grade, rank, or rating. Performance of duty despite impairment would be considered presumptive evidence of physical fitness.

3. Title 10, U.S. Code, chapter 61, provides the Secretaries of the Military Departments with authority to retire or discharge a member if they find the member unfit to perform military duties because of physical disability. The U.S. Army Physical Disability Agency is responsible for administering the Army's Disability Evaluation System (DES) and executes Secretary of the Army decision-making authority as directed by Congress in chapter 61 and in accordance with Department of Defense (DoD) Directive 1332.18 and Army Regulation 635-40 (Disability Evaluation for Retention, Retirement, or Separation).

4. Army Regulation 635-40, dated 19 January 2017, superseded Army Directive 2012-18 (Military Occupational Specialty (MOS) Administrative Retention Review (MAR2), dated 23 August 2012.

a. Chapter 3 (MAR2) implement and establishes policy for the MAR2. Soldiers must be of sufficient medical fitness to satisfactorily perform their primary MOS (PMOS) or area of concentration (AOC), as well as those functional activities listed on the DA Form 3349 (Physical Profile), which all Soldiers must perform regardless of PMOS or AOC. The MAR2 is an administrative process for Soldiers who meet the medical retention standards of Army Regulation 40-501 (Standards of Medical Fitness), but who nonetheless may not be able to satisfactorily perform the duties of their PMOS or AOC in a worldwide field or austere environment because of medical limitations.

b. The MAR2 process is used to determine whether a Soldier will be retained in their PMOS or AOC or reclassified into another PMOS or AOC. Soldiers who do not meet PMOS or AOC standards and who do not qualify for reclassification will be referred into the DES. For referral to a MAR2, the Soldier must have been issued a DA Form 3349 with a permanent (P) 3 or 4 in at least one of the profile serial factors for a medical condition(s) that meet the medical retention standards of Army Regulation 40-501.

5. Army Regulation 635-40 prescribes the Army DES and sets forth policies, responsibilities, and procedures that apply in determining whether a Soldier is unfit because of physical disability to reasonably perform the duties of his office, grade, rank, or rating. It implements the requirements of Title 10, U.S. Code, chapter 61; DoD Instructions (DoDI) 1332.18 (DES); DoD Manual 1332.18 (DES Volumes 1 through 3) and Army Directive 2012-22 (Changes to IDES Procedures) as modified by DoDI 1332.18.

a. The objectives are to maintain an effective and fit military organization with maximum use of available manpower; provide benefits to eligible Soldiers whose military service is terminated because of a service-connected disability; provide prompt disability evaluation processing ensuring the rights and interests of the Government and Soldier are protected; and, establish the MAR2 as an Army pre-DES evaluation process

for Soldiers who require a P3 or P4 profile for a medical condition that meets the medical retention standards of Army Regulation 40-501.

b. Public Law 110-181 defines the term, physical DES, as a system or process of the DoD for evaluating the nature and extent of disabilities affecting members of the Armed Forces that is operated by the Secretaries of the military departments and is composed of Medical Evaluation Boards (MEB), Physical Evaluation Boards (PEB), counseling of Soldiers, and mechanisms for the final disposition of disability evaluations by appropriate personnel.

c. The DES begins for a Soldier when either of the events below occurs:

(1) The Soldier is issued a permanent profile approved in accordance with the provisions of Army Regulation 40–501 and the profile contains a numerical designator of P3/P4 in any of the serial profile factors for a condition that appears not to meet medical retention standards in accordance with Army Regulation 40–501. Within (but not later than) 1 year of diagnosis, the Soldier must be assigned a P3/P4 profile to refer the Soldier to the DES.

(2) The Soldier is referred to the DES as the outcome of MAR2 evaluation.

d. An MEB is convened to determine whether a Soldier’s medical condition(s) meets medical retention standards per Army Regulation 40-501. This board may determine a Soldier’s condition(s) meet medical retention standards and recommend the Soldier be returned to duty. This board must not provide conclusions or recommendations regarding fitness determinations.

e. The PEB determines fitness for purposes of Soldiers’ retention, separation, or retirement for disability under Title 10, U.S. Code, chapter 61, or separation for disability without entitlement to disability benefits under other than Title 10, U.S. Code, chapter 61. The PEB also makes certain administrative determinations that may benefit implications under other provisions of law.

6. Title 38, U.S. Code, Sections 1110 and 1131, permit the VA to award compensation for disabilities which were incurred in or aggravated by active military service. However, an award of a VA rating does not establish an error or injustice on the part of the Army.

7. Title 38, Code of Federal Regulations, Part IV is the VA Schedule for Rating Disabilities. The VA awards disability ratings to veterans for service-connected conditions, including those conditions detected after discharge. As a result, the VA, operating under different policies, may award a disability rating where the Army did not find the member to be unfit to perform his duties. Unlike the Army, the VA can evaluate a veteran throughout their lifetime, adjusting the percentage of disability based upon that agency's examinations and findings.

8. Title 10, U.S. Code, section 1556 requires the Secretary of the Army to ensure that an applicant seeking corrective action by the Army Review Boards Agency (ARBA) be provided with a copy of any correspondence and communications (including summaries of verbal communications) to or from the Agency with anyone outside the Agency that directly pertains to or has material effect on the applicant's case, except as authorized by statute. ARBA medical advisory opinions and reviews are authored by ARBA civilian and military medical and behavioral health professionals and are therefore internal agency work product. Accordingly, ARBA does not routinely provide copies of ARBA Medical Office recommendations, opinions (including advisory opinions), and reviews to ABCMR applicants (and/or their counsel) prior to adjudication.

//NOTHING FOLLOWS//